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NO. 83-1221
~~NO. 83-1244~~

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHY DUNAGIN, ET AL.,
Petitioners

v.

CITY OF OXFORD, MISSISSIPPI, ET AL.,
Respondents

LAMAR OUTDOOR ADVERTISING, INC., ET AL.,
Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,
Respondents

ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are laws of the State of Mississippi, which prevent media advertisers located within the State from originating liquor advertisements in Mississippi and which were enacted pursuant to the State's legitimate and substantial interest in controlling the artificial stimulation of liquor sales and consumption created by the advertisement of liquor and its police power to control liquor within its borders, augmented by the Twenty-first Amendment, constitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

I. The Challenged Mississippi Liquor Advertising Laws

The Mississippi liquor advertising statutes and regulations that are being challenged in Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission ("Lamar"), No. 83-1224, and Dunagin v. City of Oxford ("Dunagin"), No. 83-1221, are an integral part of Mississippi's comprehensive regulatory scheme for controlling liquor1/ within its borders, known as the Local Option Alcoholic Beverage Control Law ("Local Option Law"), enacted in 1966. This act is the product of an historic compromise among several competing economic and political

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1/ "Liquor," as used in this Brief, means distilled spirits and wine above 4% alcohol by weight. See Miss. Code Ann. § 67-1-5 (Supp. 1983).

factions within Mississippi, which gave individual counties and judicial districts the opportunity to end the dichotomy between de jure statewide prohibition of liquor, which had been in effect for 58 years, and the illegal de facto availability of liquor.

The Local Option Law makes it clear that prohibition of liquor remains Mississippi's overriding policy and the central purpose of the legislation:

> The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession, and transportation of intoxicating liquor.... The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of

> the manufacture, sale, distribution, possession and transportation of intoxicating liquor....

Miss. Code Ann. § 67-1-3 (1972) (emphasis added).

The Local Option Law allows a county, or a judicial district within a county, to bring itself out from under statewide prohibition by an affirmative majority vote of the electors within the county or judicial district. Miss. Code Ann. § 67-1-11, -13 & -15 (1972). If the county or judicial district vote rejects coming out from under prohibition, or if an election is not held, the statewide prohibition laws remain in force and all aspects of liquor continue to be prohibited within that county or judicial district. If a county or judicial district votes itself

out from under the statewide prohibition, then, subject to all of the "provisions and restrictions" of the Local Option Law, the "possession and transportation" of liquor is legal throughout the county or judicial district while the "manufacture, sale, and distribution" of liquor is lawful, but only within the incorporated municipalities, qualified resort areas, and clubs of the county or judicial district as opposed to the county as a whole. Miss. Code Ann. § 67-1-7 (1972).

At the time of the Lamar trial, thirty-five "dry" Mississippi counties and four judicial districts in four other counties had not voted to legalize liquor while forty-three "wet" counties and four judicial districts in

four other counties had voted to legalize liquor to the extent permitted by the Local Option Law. Lamar R. Vol. IV, pp. 134, 135; Trial Exh. D-5.

During consideration of the Local Option Law legislation by the Mississippi House of Representatives in 1966, more than 30 amendments were offered on the floor of the House. Amendment No. 24 amended Section 31 of the bill by adding a new paragraph which read as follows:

> "It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street, or building."

Journal of the Mississippi State House of Representatives, 1966, p. 765. The amendment was incorporated as the second paragraph of Miss. Code Ann. § 67-1-85

(1972). Amendment No. 25 amended subsection (5) of Section 16 of the local option bill and read as follows:

> (5) To issue Rules prohibiting the advertising of alcoholic beverages in the State in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises which are not visible from the exterior.

Id. This amendment language is presently codified as subsection (e) of Miss. Code Ann. § 67-1-37 (1972). These two provisions, Miss. Code Ann. § 67-1-85 and 67-1-37(e) (1972), along with Regulation No. 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, promulgated pursuant to Section 67-1-37(e), are the operative

statutes and regulations challenged in Lamar and Dunagin.2/ The specific adoption of these provisions as amendments is explicit evidence of legislative intent to weave the control of liquor advertising into the compromise scheme of balancing prohibition with "strict regulation and supervision of the manufacture, sale, distribution, possession and transport of intoxicating liquor." Miss. Code Ann. § 67-1-3 (1972).

The importance of the liquor advertising statutes to the eventual passage of the Local Option Law was confirmed

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2/ The Dunagin Petitioners expressly challenge only Miss. Code Ann. § 97-31-1 (1972), a statute which predates the Local Option Law and which has been limited in scope to the provisions of the Local Option Law. See Miss. Code Ann. § 67-1-3 (1972).

and underscored by the testimony of Robert L. Livingston, former Director of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, in the Lamar trial. Mr. Livingston testified in pertinent part as follows:

> Q (Resuming) Mr. Livingston, specifically now with regard to the provisions of the Alcohol Beverage Control Law that are attacked in this lawsuit, the advertising provisions, what were the origins of those provisions in the 1966 legislative session?
>
> . . .
>
> A The origins, or the idea behind these provisions was one of strict control, that if Mississippi was ever to join the rest of the nation as a state with legalized liquor, we had to show the people that it would be possible to control it and handle it to their satisfaction so that there would be neither promotion nor encouragement of what

was a controversial subject at that time and what still is.

. . .

Q (Resuming) Mr. Livingston, what was the purpose of the alcoholic beverage advertising provisions of the Local Option Law?

. . .

A I think that it is important to know that we wouldn't have legal alcohol in the State of Mississippi today if there had not been severe controls and restrictions placed on the field of advertising.

Lamar R. Vol. IV at pp. 127, 128, 129 (emphasis added).

After passage of the Local Option Law, the Mississippi State Tax Commission implemented Miss. Code Ann. § 67-1-37(e) (1972) by promulgating its Regulation No. 6, which provides:

> [N]o person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media.... (emphasis added)

The State Tax Commission has interpreted the words, "originate advertisement in this State," in Regulation No. 6 to mean that the central place of publication or dissemination of the liquor advertisements must be within the physical boundaries of the State of Mississippi in order for Regulation No. 6 and the other challenged statutes and regulations to apply. Lamar R. Vol. J, pp. 166-167. Thus, the operative Mississippi laws challenged herein ban only in-state liquor advertising - those advertisements of liquor physically

originating in the State of Mississippi.3/

II. Lamar District Court Proceedings

The 56 Lamar Petitioners, consisting of outdoor advertisers and print and electronic media advertisers, filed this action in the United States District Court for the Southern District of Mississippi, Jackson Division, on November 1, 1978. This action was filed in order to challenge the Mississippi statutes and regulations banning liquor advertisements which originate within the State of Mississippi on the basis that such statutes and regulations

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3/ Regulation No. 6 does allows the advertisement of liquor within the confines of the state licensed retail package stores as a means of providing consumer information at the point of sale.

constitute an abridgement of commercial speech and a denial of equal protection under the law in violation of the First and Fourteenth Amendments. Petitioners sought a declaratory judgment that the challenged statutes and regulations were unconstitutional and a prohibitory injunction enjoining the Respondents from attempting to enforce them.

Federal jurisdiction was invoked under 28 U.S.C. §§ 2201, 2202, 1331 and 1343 and 42 U.S.C. § 1983.

In 1979 both Petitioners and Respondents moved for summary judgment. Both motions were denied. The case was then tried before the district court, sitting without a jury, on March 11-12, 1981. The opinion of the district court, which

appears as Appendix D to the Lamar Petition, held that Mississippi's ban on intrastate liquor advertising violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, since the ban "in no way rationally furthers the state's interest in controlling the artificial stimulation of the sale and consumption of alcoholic beverages." 539 F. Supp. 830-31, App. C at 221a. The Respondents appealed to the United States Court of Appeals for the Fifth Circuit.

III. Dunagin District Court Proceedings

The Dunagin Petitioners in this case are the certified class of past, present and future editors and business managers of the Daily Mississippian, a student-

operated newspaper at the University of Mississippi in Oxford, Mississippi. After the Daily Mississippian ran beer advertisements, an Oxford city policeman visited the offices of the Daily Mississippian and advised the editor that the paper should cease advertising beer because state law prohibited it. On April 1, 1979, Petitioners received from Gerald Gafford, as attorney for Respondent City of Oxford, a letter dated March 29, 1979. The letter stated that "[t]his is a request that you consider the adoption of a policy which would eliminate the advertisement of intoxicating beverages in your paper." Dunagin v. City of Oxford, 489 F. Supp. 763, 766 (N.D. Miss. 1980). The Petitioners responded by filing suit in the United States

District Court for the Northern District of Mississippi on June 7, 1979, seeking injunctive relief against the City, a declaration that the statute was unconstitutional, certification as a class action, and attorney's fees pursuant to 42 U.S.C. § 1988. The Petitioners invoked the court jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) for a cause of action under 42 U.S.C. § 1983.

On June 27, 1979, the Respondent State of Mississippi moved to intervene as a defendant and this motion was granted on June 29, 1979. Also on June 29th, the City of Oxford stipulated ex parte that it would not instigate legal proceedings pending the outcome of the district court action.

On July 3, 1979, the City of Oxford

filed its answer in which it contended that Miss. Code Ann. § 97-31-1 (1972) prohibits beer advertisements. The State of Mississippi, however, contended in a summary judgment motion that the statute did not prohibit beer advertisements and on that basis claimed that there was no case or controversy and moved for dismissal. The district court granted the State's summary judgment motion on January 10, 1980, holding that beer advertising is not restricted in Mississippi,4/ although Petitioners were allowed to amend their complaint to specifically allege an intent to challenge the statute as it prohibited liquor

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4/ Dunagin v. City of Oxford, 489 F. Supp. 763, 767, n.4 (N.D. Miss. 1980). See 1934 Miss. Laws Ch. 172 (amending Miss. Code Ann. § 97-31-1 (1972) to permit beer advertising).

advertisements. The amended complaint was filed on January 23, 1980.

On February 27, 1980, the district court granted Petitioners' motion for class certification and certified a plaintiff class of all past, present, and future students elected or appointed to an editorial or business manager position with the Daily Mississippian. On May 2, 1980, the district court entered summary judgment for the Respondents, declaring Miss. Code Ann. § 97-31-1 (1972) to be constitutionally valid under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. From this order, the previous order dismissing the suit for lack of case or controversy, and the order denying Petitioners an award

of attorney's fees, the Petitioners appealed to the United States Court of Appeals for the Fifth Circuit.

IV. Consolidated Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), Lamar and Dunagin were consolidated after the submission of Dunagin to a panel of the Court was vacated due to the death of one of the panel members. A panel of the Court of Appeals heard the consolidated appeal and decided that the challenged laws and regulations were an unconstitutional restriction of commercial speech but did not resolve the issue of whether the restriction also violated the Equal Protection Clause. 701 F.2d at 334 n.29, App. B at 158a, n.29.

Before delivery of the panel opinion, the United States Court of Appeals for the Tenth Circuit issued a conflicting opinion5/ upholding an Oklahoma law which banned all liquor advertisements originating in the intrastate and interstate commerce against a First Amendment challenge by cable television companies. Pursuant to the rules of the Fifth Circuit governing the issuance of opinions in conflict with a decision of another circuit, a rehearing en banc was ordered, and the panel opinion was vacated.6/

The en banc Court concluded that the

5/ Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub. nom., Capital Cities Cable, Inc. v. Crisp, ____ U.S. ____, 104 S.Ct. 66, 77 L.Ed. 2d ____ (1983).

6/ 718 F.2d at 315, n.2, App. A at 3a, n.2.

Mississippi regulatory scheme violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment, reversed the judgment of the Lamar district court and upheld the judgment of the Dunagin district court. Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc); Lamar App. A at 1a-72a; Dunagin App. at 1-85.

The Court of Appeals ruled that "[w]e base our decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980)," and acknowledged that this Court's recent commercial speech decision, Bolger v. Youngs Drug Products Corp., _____ U.S.

____, 103 S.Ct. 2875, 2882, 77 L.Ed. 2d 469 (1983), "reaffirmed the Central Hudson Gas test as the basic method of deciding commercial speech cases." 718 F.2d at 747, 748. Analyzing the challenged Mississippi liquor advertising laws under the four elements of the Central Hudson test, the Court of Appeals held that such laws did not violate the Petitioners' alleged First Amendment rights. See 718 F.2d at 747-751; Lamar App. A at 33a-53a; Dunagin App. at 42-64.

Although not relied on as the basis for the Court's First Amendment analysis, California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981), and Queensgate

Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138, appeal dismissed, ____ U.S. ____, 103 S.Ct. 31, 74 L.Ed. 2d 45 (1982), were discussed by the Court as providing "an added presumption of validity" for state liquor regulations, consistent with its previous ruling in Castlewood International Corp. v. Simon.7/ 718 F.2d at 746, 750, Lamar App. A at 47a-48a; Dunagin App. at 58.

In ruling on the Lamar Petitioners' equal protection claim, the Fifth Circuit rejected the applicability of the strict scrutiny standard of review. The Court held that (1) there can be no

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7/ 546 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed. 2d 806 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980).

infringement of a fundamental right since the Court found that no First Amendment rights were violated and (2) commercial speech, in contrast to ideological speech, is entitled to only a "limited measure of protection" under the First Amendment. Additionally, the Court found that in-state and out-of-state advertisers are not similarly situated classes. The Court ultimately held that the Mississippi liquor advertising laws do not violate the Equal Protection Clause under the rational basis standard of review. 718 F.2d at 752, 753; Lamar App. A at 58a-61a; Dunagin App. at 70-73.

REASONS FOR DENYING THE WRITS

It is undisputed that the Fifth Circuit's en banc decision presents no conflict with the decision of any other court of appeals. This Brief will demonstrate that the Lamar and Dunagin Petitions establish no conflict with the applicable decisions of this Court and present no important questions of federal law which should be settled by this Court.

I. Contrary to the Petitioners' Contentions, the Fifth Circuit Did Not Alter the Standard of Review or Shift the Burden of Proof Regarding the Constitutionality of the Challenged Mississippi Liquor Advertising Laws, But Applied the Central Hudson Standard in Harmony With the Analogous Commercial Speech Decisions of this Court.

The Lamar and Dunagin Petitioners (collectively referred to as "the Petitioners") request this Court to review the Fifth Circuit en banc deci-

sion because they claim the decision alters the standard of review and shifts the burden of proof which would otherwise apply to commercial speech restrictions. Specifically, the Petitioners claim that the Fifth Circuit analyzed the constitutionality of the challenged Mississippi liquor advertising laws under the deferential rational basis standard of review rather than the four-part test8/ for commercial speech set

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8/ This four-part test is summarized as follows: (1) the expression must be related to illegal activity and must not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the asserted governmental interest asserted; and (4) the regulation must be no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed. 2d 341, 351 (1980).

forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980). Lamar Petition at 10, 14; Dunagin Petition at 15. Although the Respondents vigorously submit that the Fifth Circuit should have applied the rational basis test standard of review due to the state's police power over liquor within its borders, augmented by the Twenty-first Amendment,9/ the Court did not do

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9/ A full discussion of this important issue is not necessary to the purpose of this Brief since the Court applied the Central Hudson standard. However, Respondents point out that no one disputes that a state may maintain a complete prohibition of all incidents of liquor pursuant to its police power. E.g., New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600, 69 L.Ed. 2d 357, 360 (1981). Therefore, the State's authority to completely prohibit liquor alto-

so. Thus, Petitioners present no basis for certiorari review.

The Fifth Circuit expressly held in its en banc decision that "[w]e base our

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gether necessarily provides it the lesser included power to condition the availability of liquor on the absence of advertising. See Ziffrin v. Reeves, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128, 135 (1939); Premier-Pabst Sales Co. v. State Board of Equalization, 13 F. Supp. 90, 95-96 (S.D. Cal. 1935) (three-judge court). This is particularly true in Mississippi where part of the quid pro quo for legalization of liquor sales and consumption was the absence of advertising. This police power is augmented by the Twenty-first Amendment, as this Court held in Bellanca and other decisions. Furthermore, Bellanca made it clear that, in conflicts between a lower protected form of speech, such as nude dancing and commercial advertising, and a state's authority to control liquor, the rational basis standard is applicable. Under this minimum scrutiny, the challenged Mississippi laws are clearly constitutional.

decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York [citation omitted]." 718 F.2d at 746-747; Lamar App. A at 32a; Dunagin App. at 41. This standard of review was acknowledged by the Court of Appeals "as the basis method of deciding commercial speech cases," citing Bolger v. Youngs Drug Products Corp., ____ U.S. _____, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983). 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 41-42. The Fifth Circuit analyzed the challenged Mississippi laws under each of the four elements of the Central Hudson test and correctly found that these laws pass constitutional muster despite the

Petitioners' claims of First Amendment protection.

Since it is evident that the Fifth Circuit utilized the Central Hudson commercial speech test in reaching its conclusion that the Mississippi laws are constitutional, the Petitioners are reduced to claiming that the Fifth Circuit misapplied the Central Hudson standard. The Lamar Petitioners concede that merely the misapplication of the Central Hudson test would not merit this Court's exercise of certiorari review:

> If the proper standard of review for restrictions on truthful advertising of legally available products had merely been misapplied, then the error committed by the Fifth Circuit in upholding, as constitutional, Mississippi's ban on liquor advertising might not merit this Court's attention.

Lamar Petition at 10,11. Thus, the Lamar Petitioners acknowledged that the misapplication of the Central Hudson test to the facts of these cases would represent neither a conflict with the decisions of this Court nor a sufficiently important question for this Court to review. This is a correct assessment. Such a review would involve primarily the interests of the parties under the specific provisions of the Mississippi liquor advertising laws. This Court has held that its certiorari jurisdiction will be exercised to review only those cases which involve "principles, the settlement of which are of importance to the public as distinguished from that of the parties." National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502, 71

S.Ct. 453, 456, 95 L.Ed. 479, 482 (1951). Accord, Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955) (This Court will not grant certiorari to review a case "for the benefit of the parties litigant."). Thus, this Court should not issue a writ of certiorari to review the Fifth Circuit's decision that the challenged Mississippi laws pass muster under the Central Hudson commercial speech test.

The Petitioners also improperly argue that the Fifth Circuit misapplied the Central Hudson test to the facts of these cases. Although this argument does not present a legitimate issue for certiorari review, this Brief will demonstrate that the Fifth Circuit's en banc decision correctly applied the ele-

ments of the Central Hudson test that are contested by the Petitioners and followed the reasoning of analogous commercial speech decisions of this Court in doing so.

The Fifth Circuit first held that liquor advertisements in Mississippi "should be treated at the outset as protected commercial speech." 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 42. Under this threshold element of the Central Hudson test, the Fifth Circuit disagreed with Respondents in holding that the liquor advertisements sought to be disseminated by Petitioners are not related to illegal activity and are not misleading. 718 F.2d at 742, 743;10/ Lamar App. A at 15a-19a; Dunagin App. at 21-25.

The Court of Appeals next confirmed that "[t]here can be no question ... that Mississippi does assert a substantial interest, which the state describes to be 'safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor.'" 718 F.2d at 747; Lamar App. A at 33a-34a;

10/ A discussion of this aspect of the Court's decision is unnecessary to the purpose of this Brief. However, Respondents continue to vigorously assert that Petitioners' liquor advertisements are not entitled to further analysis under the remaining Central Hudson elements because these advertisements are related to illegal activity in Mississippi, half the counties of which are "dry," and are inherently misleading, providing no information regarding the undisputed dangers of alcohol consumption.

Dunagin App. at 42.11/ As evidence of the substantial nature of the State's interest, the Court referred to the undisputed testimony in the Lamar trial regarding the problems that alcohol abuse causes in our society, such as "coronary heart disease, gastrointestinal cancer, cirrhosis of the liver, traffic accidents, and occupational and family problems." 718 F.2d at 747; Lamar App. A at 34a; Dunagin App. at 43. In fact, the Lamar Petitioners, as well as all previous court decisions in these cases, have agreed that the State's interest is substantial.

11/ Although without merit, the Dunagin Petitioners' argument, at page 12 of their Petition, that the State's interest is insubstantial has not been previously raised and is therefore improper.

Central Hudson itself supports the substantiality of the State's interest in suppressing demand for liquor created by advertising as part of its regulatory scheme for controlling the undisputed problems created by liquor consumption. In Central Hudson, this Court agreed that "the state's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity" and, due to the importance of energy consumption, the state's interest was deemed substantial. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 568, 100 S.Ct. 2343, 2352, 65 L.Ed. 2d 341, 352 (1980). Analogously, the significant problems associated with liquor consumption are sufficient to

support suppression of advertising designed to increase consumption of liquor.

Under the third element of the Central Hudson test, the Court held that Mississippi's liquor advertising laws directly advance the state's substantial interest in controlling such advertising. 918 F.2d at 747-751; Lamar App. A at 34a-49a; Dunagin App. at 43-60. The Fifth Circuit expressly followed the reasoning of this Court in Central Hudson and in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981), in reaching this conclusion. 718 F.2d at 749-95; Lamar App. A at 4a-47a; Dunagin App. at 54-58.

In Central Hudson, this Court judicially noticed "an immediate connection between advertising and demand for

electricity" and thus held that there was a "direct link between the state interest in conservation and the Commission's order," which banned promotional advertising by electric utilities. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980). Similarly, in Metromedia, this Court agreed with the "accumulated, common sense judgments of [the] local lawmakers" that "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable" and that "[i]t is not speculative to recognize that billboards by their very nature ... can be perceived as aesthetic harm." 453 U.S. at 509, 510, 101 S.Ct. at 2893-2894, 69 L.Ed. 2d at 815, 816.

Thus, this Court held in Metromedia that San Diego's billboard ban directly advanced its substantial governmental interest of traffic safety and aesthetic appearance under the Central Hudson test. Drawing its analysis from these decisions,12/ the Fifth Circuit in these cases properly held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." 718 F.2d at 750; Lamar App. A at 47a; Dunagin App. at 58.

12/ The Fifth Circuit also found persuasive the decisions of other courts that have considered the connection between advertising and consumption and found a direct link. See 718 F.2d at 747-748; Lamar App. A at 35a-37a; Dunagin App. at 44-46.

In so holding, the Fifth Circuit properly rejected the Lamar Petitioners' claim that the Respondents must provide "concrete scientific evidence" to substantiate the relationship between liquor advertising and consumption. As the Fifth Circuit recognized, this relationship between advertising and consumption is a "legislative" or "constitutional" fact issue which is bound up in the constitutional judgment that the appellate court must make independently of the district court's findings. 718 F.2d at 748, n.8; Lamar App. A at 40a; Dunagin App. at 50. See Ohralik v. Ohio State Bar Association, 436 U.S. 437, 463, 98 S.Ct. 1912, 1922, 56 L.Ed. 2d 454, 458 (1978); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348-349 (1st Cir. 1975); see also,

Drope v. Missouri, 420 U.S. 162, 175, n.10, 95 S.Ct. 896, 905, n.10, 43 L.Ed. 2d 103, 115, n.10 (1975). Scientific proof is not required to establish this legislative fact as this Court made clear in Central Hudson and, as taught in Metromedia, the judgment of the Mississippi Legislature that the ban on intrastate advertising decreases the stimulation of liquor sales and consumption is entitled to great weight.

For the same reason, the Fifth Circuit properly rejected the Lamar district court's conclusions that the state is "inundated" and "saturated" with out-of-state liquor advertisements and thus that the liquor advertising laws do not directly advance the State's interest. This conclusion was not a finding of fact entitled to "clearly

erroneous" review as the Lamar Petitioners apparently claim. See Lamar Petition at 12. The Fifth Circuit was required to reach its own conclusion regarding this legislative fact issue.12/

The Court cited several reasons in support of its conclusion. First, echoing the conclusion of this Court in Central Hudson, the Court of Appeals recognized that the Petitioners "would not be pursuing this case so vigorously if the market were truly saturated." 718 F.2d at 750; Lamar App. A at 48a;

12/ In fact, the Lamar district court's statement was included in the "Conclusions of Law" section of its opinion. Of course, the clearly erroneous rule does not apply to conclusions of law. E.g., 5A Moore, Federal Practice ¶ 52.03[2], at p. 2662 (1983).

Dunagin App. at 59. See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980) ("Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

Secondly, the Lamar Petitioners' "evidence that liquor advertising appeared in national magazines in the Jackson [Mississippi] library, out-of-state radio and television broadcasts and out-of-state newspapers does not establish that advertising will not dramatically increase if the intrastate ban is invalidated." 718 F.2d at 750-751; Lamar App. A at 48a-49a; Dunagin App. at 59. In reality, the challenged laws

effectively restrict the primary source of liquor advertising for the Mississippi market - the in-state advertisers. Evidence in the Lamar record demonstrates that the Lamar Petitioners alone provide advertising coverage for the entire state. Lamar R. at 231-620. Thus, if the advertising laws were removed, liquor advertising would indeed "dramatically increase" in Mississippi.

Thirdly, the Court of Appeals concluded that "[i]f it were true that consumers were now being inundated with commercial information about liquor in contravention of the state's interest, the values behind the commercial speech doctrine would not be very much threatened," since the primary interest protected by the commercial speech doctrine are those of "the listener -

the consumer - in receiving information," not the interest of the speaker as in the idealogical speech. 718 F.2d at 751-752; Lamar App. A at 49a, 59a; Dunagin App. at 67-68. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed. 2d 341, 349 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").13/

The Fifth Circuit completed its Central Hudson analysis by finding that the State's liquor advertising laws "are no broader than necessary to pursue its

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13/ The Petitioners improperly rely on Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975), to support an argument that the First Amendment supports the newspaper Petitioners' alleged com-

goal of preventing the artificial stimulation and promotion of liquor sales and consumption." 718 F.2d at 751; Lamar App. A at 50a; Dunagin App. at 61. Contrary to the argument at page 14 of the Dunagin Petition, the Fifth Circuit reasoned that "a less restrictive time, place and manner restriction, such as a

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mercial advertising rights. Lamar Petition at 16; Dunagin Petition at 17. In Bigelow, this Court's primary First Amendment concern was directed at "national and interstate newspapers," id. at 828, 829, 95 S.Ct. at 2236, 44 L.Ed. 2d at 615, 616, advertising out-of-state abortion services, an "activity with which ... the state could not interfere." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760, 96 S.Ct. 1817, 1825, 48 L.Ed. 2d 346, 357 (1976). In contrast to Bigelow, the instant cases concern restrictions on in-state media advertisers of liquor, over which the State has extensive power.

disclaimer warning of the dangers of alcohol," would not be effective. The Court correctly reasoned that the State's concern "is that advertising will unduly promote alcohol consumption despite known dangers" and "not that the public is unaware of the dangers of alcohol." 718 F.2d at 751; Lamar App. A at 51a-53a; Dunagin App. at 62-64.

This analysis by the Fifth Cirtcuit followed that of Metromedia in which this Court reasoned that "the most direct and perhaps the only effective approach to solving the problems [billboards] create is to prohibit them." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508, 101 S.Ct. 2882, 2893, 69 L.Ed. 2d 800, 815 (1981).

As just demonstrated, the Fifth

Circuit properly applied the contested elements of the Central Hudson test to the facts of these cases, although this examination is not a proper ground for certiorari review by this Court.14/ Clearly, the Fifth Circuit's decision to uphold the constitutionality of the Mississippi liquor advertising laws under the Central Hudson standard does not merit this Court's review since the

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14/ A discussion of the argument at pages 18 and 19 of the Dunagin Petition that the Misissippi liquor advertising laws were unconstitutionally applied to impede the advertisement of beer by the Dunagin Petitioners, which is without merit, is beyond the purpose of this Brief. This contention, even if valid, would not be a proper question for review by this Court since it is "episodic" and relates solely to the interests of the parties. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955).

decision is not in conflict with this Court's decisions and does not present any substantial federal question.

II. Contrary to the Lamar Petitioners' Contention, the Fifth Circuit Did Not Deny Them Standing to Assert an Equal Protection Challenge and Followed the Decisions of this Court in Refusing to Adopt a Strict Scrutiny Standard of Review for Commercial Speech Under the Equal Protection Clause

The Lamar Petitioners also argued that the Fifth Circuit has denied "standing [to] media businesses to challenge restrictions on commercial speech on equal protection grounds in conflict with the reasoning of opinions of this Court." Lamar Petition at 17, 21. Again, the Lamar Petitioners are refuted by the express language of the en banc decision. Citing and con-

sistent with Metromedia, which indicates that advertisers have standing to challenge advertising restrictions, the Court of Appeals clearly stated: "We do not mean to suggest that media advertisers lack standing to challenge commercial speech regulations." 718 F.2d at 752; Lamar App. A at 57a; Dunagin App. at 68. Thus, again these Petitioners present no viable question for review. Additionally, this question of standing would concern primarily the interests of the parties and would not constitute a proper issue for this Court's review.

The Lamar Petitioners are actually requesting this Court to create new constitutional law by adopting a strict scrutiny standard for commercial speech under the Equal Protection

Clause.15/ In fact, the Lamar Petitioners ask this Court to apply the strict scrutiny analysis even when it is found that no First Amendment commercial speech rights have been violated. These contentions are contrary to this Court's prior equal protection decisions. Furthermore, no commercial speech decisions of this Court have utilized the strict scrutiny standard under the Equal Protection Clause as confirmed by the Lamar Petitioners' improper reliance on decisions involving non-commercial, ideological speech to support this invalid argument. Lamar Petition, at 19, n.19. Petitioners' contentions certainly do not present a conflict or

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15/ The Dunagin Petitioners have not raised an equal protection issue in their Petition to this Court.

substantial federal question which merits review.

The crux of the Lamar Petitioners' erroneous argument is that advertising is entitled to strict scrutiny review since, as commercial speech, advertising is a "fundamental right." Lamar Petition at 20. This argument is contrary to the consistent position of this Court that only ideological speech is a "fundamental right" under the First Amendment. For example, in Metromedia, this Court stated that commercial speech is entitled to only "a limited measure of protection, commensurate with its subordinate position in the scope of First Amendment values" and that "[t]he difference between commercial price and product advertising and ideological communication permits regulation of the

former that the First Amendment would not tolerate with respect to the latter." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed. 2d 800, 815 (1981). Accord, e.g., Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 103 S.Ct. 2875, 2879, 77 L.Ed. 2d 469, 476 (1983). (Due to the "commonsense distinction" between commercial speech and other forms of speech, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.") One reason for this "commonsense distinction," as explained by the Fifth Circuit, is that commercial speech advances only the economic interest of the speaker whereas idealogical speech advances primarily its speaker's "exposition of ideas,"

which is at the heart of First Amendment protection. The primary interests protected by commercial speech "are those of the listener - the consumer - in receiving information." 718 F.2d at 752; Lamar App. A at 56a; Dunagin App. at 67-68. The Dunagin Petitioners admit this fact at page 6 of their Petition.

The Lamar Petitioners are also wrong to suggest that the challenged liquor advertising laws may be held constitutional under the First Amendment and still be entitled to strict scrutiny review under the Equal Protection Clause. If the First Amendment is not violated, there could not possibly be any "fundamental right" which would trigger strict scrutiny. In fact, since the challenged laws are constituional under the First Amendment, they are

constitutional under the Equal Protection Clause because "they had already been found to represent the promotion of governmental values which override the individual interest in exercising their specific right." Nowak, Rotunda & Young, Handbook on Constitutional Law 676 (1978).

Additionally, the in-state advertisers and out-of-state advertisers are not "similarly situated groups" as the Lamar Petitioners also incorrectly argue. Lamar Petition at 18, n.18. The plain fact is that these groups are not similarly situated since liquor advertisements originating outside of Mississippi are beyond the State's control, both legally and as a practical matter, as the Fifth Circuit states:

> We think it exceedingly unlikely that the state could block, jam, or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical manner, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment.

718 F.2d at 753; Lamar App. A at 59a-60a; Dunagin App. at 71-72. See Packer Corp. v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274-275, 76 L.Ed. 643, 647 (1932). Recognition of this common sense fact is the basis for the solely intrastate restrictions on liquor advertising in Mississippi.

Under the applicable rational basis standard of review, the Fifth Circuit properly found that Mississippi has a legitimate interest in controlling liquor advertising and that "the state could have rationally concluded that

local advertising was the promotion of intoxicating liquor that was susceptible to regulation." 718 F.2d at 753; Lamar App. A. at 61a; Dunagin App. at 73. Thus, the Lamar Petitioners present no questions concerning the Equal Protection Clause that merit this Court's review.

III. The Granting of Certiorari to Review Capital Cities Cable, Inc. v. Crisp, No. 82-1795, Does Not Support the Granting of Certiorari to Review the Instant Cases.

This Court recently granted certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit that concerns the constitutionality of Oklahoma liquor advertising restrictions on cable television advertising, Capital Cities Cable, Inc. v. Crisp, No. 82-1795.

The granting of certiorari in

Capital Cities Cable should not affect this Court's decision to grant or deny certiorari in these cases.16/ Capital Cities Cable is distinguishable from Lamar and Dunagin since it concerns restrictions on cable television under a regulatory scheme which bans in-state and out-of-state liquor advertisements. Furthermore, the review by this Court focuses on a conflict between Oklahoma's authority to ban wine advertisements on cable television and federal control of cable television advertising under federal statutes and Federal Communication Commission regulations. In fact, this Court specifically directed the parties in Capital Cities

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16/ The decision that is being reviewed is Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983).

Cable to brief and argue this federal-state regulatory conflict in its October 3, 1983 order granting a writ of certiorari:

> [T]he parties are directed to brief and argue the following question: Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

In contrast to Oklahoma, Mississippi's intrastate liquor advertising ban does not restrict liquor advertising on cable television or any other out-of-state media. As pointed out by the Fifth Circuit in its en banc decision: "The state has ... interpreted federal regulations to prohibit the state from interrupting or deleting wine commercials from cable television transmission sent from out-

side the state. See, 47 C.F.R. 76.55 (1982)." 718 F.2d at 741; Lamar App. A at 11a; Dunagin App. at 16. Thus, contrary to the statement at page 20 of the Dunagin Petition, the granting of a writ of certiorari in Capital Cities Cable does not support the granting of certiorari in these cases.

IV. Conclusion

As this Brief has demonstrated, the Lamar and Dunagin Petitioners present no conflicts with this Court's decisions and no important constitutional issues which merit review by this Court. Thus, particularly in light of this Court's "duty to avoid decisions on constitutional issues unless avoidance becomes evasion," 17/ this Court should deny the

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17/ Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 617, 99 L.Ed. 897, 901 (1955).

Petitions "for want of a substantial federal question," just as this Court similarly dismissed a liquor advertiser's challenge to a state ban on advertising of liquor price and price advantage by the drink in Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138, appeal dismissed, _____ U.S. _____, 103 S.Ct. 31, 74 L.Ed. 2d 45 (1982).

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Dated: April 9, 1984

CERTIFICATE OF SERVICE

I, JOHN E. MILNER, one of the counsel for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of April, 1984, I served copies of the foregoing Respondents' Brief in Opposition on Petitioners by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following attorneys for Petitioners:

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